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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1062

JAMES CALDWELL

Petitioner

versus

CITY OF NEW ORLEANS,

Respondent

Petition For Writ of Certiorari
To The Supreme Court of the State
of Louisiana

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ATTORNEYS FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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NO.

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JAMES CALDWELL,

Petitioner,

versus

CITY OF NEW ORLEANS,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

---

Petitioner, James Caldwell, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana, entered in the above-entitled case on January 10, 1975, No. 55,666, of the docket of

that Court.

## OPINIONS BELOW

Municipal Court for the City of New Orleans: On June 18, 1974, the Honorable Joseph Bossetta, Judge, denied petitioner's motions to quash the evidence seized and motion for trial by jury. His judgment was upheld by both the Criminal District Court of Appeals for the Parish of Orleans, on June 24, 1974, and by the Supreme Court of Louisiana, on July 1, 1974. The opinion and holding of each Court in such preliminary matters may be found in Appendix A, pages 26 thru 33.

Municipal Court for the City of New Orleans: The judgment and opinion of the Municipal Court was rendered on July 16, 1974, wherein the Honorable Philip S. Brooks, Judge Ad Hoc, convic-

ted the petitioner and sentenced him to pay the maximum fine of One Hundred ($100.00) Dollars and to serve the maximum sentence of ninety (90) days in jail. Judge Brooks' unreported opinion may be found in Appendix B, at page 35.

Criminal District Court for the Parish of Orleans: This court entered its decision affirming the judgment of the Municipal Court, on December 4,1974. It was not reported, but may be found in Appendix B, at page 44.

Supreme Court of Louisiana: The decree and mandate of the Supreme Court refusing application for Writ of Certiorari was entered on January 10,1975. The Supreme Court wrote no opinion. Its unreported judgment may be found in Appendix B, at page 50.

## JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on Jauuary 23, 1974, at which time it became final. The jurisdiction of this Court is invoked under the provision of 28 U.S.C. Section 1257(3).

## THE QUESTIONS PRESENTED

1. Whether Municipal Ordinance No. 828 MCS 42-46 of the Code of New Orleans, which prohibits obscenity,but fails to erect procedural safeguards by which to determine "contemporary community standards" of obscenity, and which is exempt from the Sixth Amendment requirement of a jury trial, by which such standards are traditionally ascertained, is invalid under the Due Process Clause of the Fourteenth Amendment to the Constitution in its depri-

vation of petitioner's First Amendment rights?

2. Whether a search warrant was issued without probable cause, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, for the reasons that the affidavit upon which the warrant was based did not establish facts supporting probable cause, the search warrant on its face did not conform to the affidavit, and the search warrant on its face was general, overbroad, and unspecific?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. CONSTITUTION OF THE UNITED STATES:

AMENDMENT ONE Provides in part:
"Congress shall make no law... abridging the freedom of speech, or of the press;..."

AMENDMENT FOUR provides:
"The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

AMENDMENT SIX provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed . . . . "

AMENDMENT FOURTEEN provides in part: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

II. MUNICIPAL ORDINANCE NO. 828 MCS 42-46 OF THE CODE OF NEW ORLEANS provides in part:

"It is unlawful for any person to knowingly send or cause to be sent, bring or cause to be brought into the Parish of Orleans for sale or distribution, or in this

> Parish prepare, publish,print, exhibit, distribute or offer to distribute, or have in his possession with intent to distribute or to exhibit or offer to distribute any obscene material . . . . "

A. "OBSCENE" means that:

> 1. the average person,applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; and
>
> 2. the work depicts or describes actual or simulated acts of human sexual intercourse, sodony, bestiality, oral copulation, masturbation, excretory functions or lewd exhibition of the genitals; and
>
> 3. the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

The entire Ordinance may be found in Appendix C, at page

## STATEMENT OF THE CASE

1. On May 10, 1974, the petitioner, James Caldwell, was arrested and charged

with violating Municipal Ordinance No. 828 MCS 42-46 of the Code of New Orleans, by showing "Deep Throat", an allegedly obscene movie, at the Cinema 16 Adult Movie Theatre, located at 1014 Canal Street, New Orleans, Louisiana.

2. The Honorable Joseph Bossetta, Judge of the Municipal Court for the City of New Orleans, viewed the film, "Deep Throat", at an evidentiary hearing and determined it to be "obscene", in violation of Municipal Ordinance No.828 MCS 42-46.

3. Counsel for the petitioner filed a Motion to Quash, a Supplemental Motion to Quash, and a Motion for Trial by Jury, alleging the unconstitutionality of the Municipal Ordinance, for several reasons, including the following:

a) The ordinance does not provide

for procedural safeguards for determining "contemporary community standards", which is the historic role of the jury.

b) The search warrant in the instant case was issued without probable cause, on its face it does not conform to the affidavit, and on its face it is general and overbroad and not specific in that it fails to allege that the "contemporary community standards" of the City of New Orleans were in any way offended or that the subject matter of the film appealed to the "prurient interest," or that the work taken as a whole lacked serious literary, artistic, political or scientific value, in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

After oral arguments on said motions, on June 18, 1974, Judge Bossetta overruled the motions and held Municipal Ordinance No. 828 MCS 42-46 to be constitutional. The Judge also granted a stay order for a period of 48 hours to enable the petitioner to apply to the Louisiana Supreme Court for the Writs of Review of his judgment.

4. On June 21, 1974, the Louisiana Supreme Court denied petitioner's applications for writs of certiorari, prohibition and mandamus and for a stay order, on the grounds that such applications were premature because petitioner had not yet exhausted his remedy to the Criminal District Court of Appeal for the Parish of Orleans, pursuant to Article 7, Section 94(i) of the Louisiana Constitution.

5. Therefore, on June 21, 1974, petitioner applied for similar writs and a stay order to the Criminal District Court of Appeal for the Parish of Orleans, which application was denied on June 24, 1974.

6. After the denial of said applications, the petitioner, on June 24, 1974, again filed applications for writs of

certiorari, prohibition and mandamus, and for a stay order with the Louisiana Supreme Court. On July 1, 1974, the Louisiana Supreme Court denied these applications on the grounds that they were premature because there had been no final conviction followed by an exhaustion of appellate procedures.

7. The petitioner, James Caldwell, was convicted by the Honorable Philip S. Brooks, Judge Ad Hoc, of the Municipal Court for the City of New Orleans, on July 16, 1974, for violating Municipal Ordinance No.828 MCS 42-46 of the Code of New Orleans by showing an allegedly obscene movie entitled "Deep Throat". He was sentenced to pay the maximum fine of $100.00 and to serve the maximum sentence of ninety (90) days in jail.

8. Petitioner's subsequent appeal from this judgment of the Municipal Court was affirmed by the Honorable Matthew S. Braniff, Judge of the Criminal District Court of Appeals for the Parish of Orleans, on December 4, 1974.

9. Judge Braniff allowed counsel for petitioner ten(10) days in which to apply for Writs of Certiorari to the Louisiana Supreme Court. The Supreme Court refused said application for writs on January 10, 1975, and on January 22, 1975, on petitioner's motion, the Louisiana Supreme Court stayed execution, mandate, and enforcement of the judgment and decree rendered by the Municipal Court, pending petitioner's application for a writ of certiorari to this Court.

10. The federal questions were

briefed, argued and reargued in the Municipal Court for the City of New Orleans and the Criminal District Court of Appeal for the Parish of Orleans, and urged and reurged in applications for writs to the Supreme Court of Louisiana. In each instance, the federal questions were decided adversely to the petitioner.

## REASONS FOR GRANTING THE WRIT

1. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS THE DEPRIVATION OF LIBERTY AND PROPERTY UNDER A MUNICIPAL ORDINANCE THAT FAILS TO ADEQUATELY DEFINE OR ERECT PROCEDURES FOR DETERMINING THE "CONTEMPORARY COMMUNITY STANDARDS" BY WHICH THE ORDINANCE CIRCUMSCRIBES AND PUNISHES THE EXERCISE OF FIRST AMENDMENT FREEDOMS. DUE PROCESS IS FURTHER VIOLATED BECAUSE THE ORDINANCE DENIES THE PETITIONER HIS SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY, BY WHICH SUCH "COMMUNITY STANDARDS" ARE HISTORICALLY ASCERTAINED.

Municipal Ordinance No. 828 MCS 42-46

of the New Orleans Code defines "ob - scene" as that which "the average person applying contemporary community standards would find . . . appeals to the prurient interest . . . ." (Emphasis added). Yet, the ordinance provides no procedural devices for ascertaining such community standards.

The petitioner, James Caldwell, was deprived of his liberty for six (6) months and his property to the extent of $100.00 without due process of the law, because the City of New Orleans and State of Louisiana, in their failure to provide the petitioner with a jury trial, abrogated his ability to determine if the acts with which he was charged in fact offended community standards.

Although the maximum penalty for

violation of Municipal Ordinance No. 828 MCS 42-46 is imprisonment for six (6) months and/or a fine of $100.00, the petitioner's Sixth Amendment right to a trial by jury can be ignored only if the crime with which he is charged "otherwise qualif[ies] as [a] petty offense." Duncan v. Louisiana, 391 U.S. 145, 159 (1968); Singer v. United States 380 U.S. 24 (1965). Certainly, laws which impose criminal penalties for exercising First Amendment rights to free expression cannot be considered "petty offenses."

A jury trial is particularly essential to Due Process in prosecutions where the contravention of "contemporary community standards" is an element of the offense. For, the jury has historically been the yardstick for measuring

community values. Miller v. California, 413 U.S.15 at 30-34 (1973). Every obscenity case considered by this Court has involved a jury determination of community standards, and this Court, in upholding such state prosecutions, has remained cognizant of the vital importance of that factor. See Hamling v. United States, 94 S.Ct. 2887 (1974); Jenkins v. Georgia, 94 S .Ct. 2750 (1974); Miller v. California, supra. Specifically the Court reiterated its finding in Miller that it is "constitutionally permissible to permit jurors to rely on the understanding of the community from which they came as to contemporary community standards." Jenkins v. Georgia, supra, 15 Cr.L. at 3260.

The New Orleans adult community, as well as this petitioner will continue to

be denied due process and the right to free expression for as long as city officials persist in instigating obscenity prosecutions based upon Municipal Ordinance No.828, without providing for jury trials. The comment of the Honorable Justice Douglas, in footnoting his dissenting opinion in Hamling v. United States, supra, 15 Cr.L. 3239, 3255(1974) aptly illustrates this assertion.

"Our First Amendment contains no. . . qualification [restricting freedom of speech and opinion in the interests of decency and morality] and certainly when Jefferson and Madison drafted it, sex had as great a potential for vulgarity as for beauty. If they had wanted a federal censor to edit our publications, they certainly would have made it explicit."

Only the community, as embodied in the local jury, can decide for itself what communications it prefers to condemn as "obscene". Until such community determinations are mandated and effectuated, Municipal Ordinance No. 828 MCS 42-46 of the New Orleans Code will continue to intolerably deprive New Orleans citizens and this petitioner of their Constitutional rights of free expression and Due Process.

2. A SEARCH WARRANT IS ISSUED WITHOUT PROBABLE CAUSE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FOR THE REASONS THAT THE AFFIDAVIT UPON WHICH IT WAS BASED DID NOT ESTABLISH FACTS SUPPORTING PROBABLE CAUSE, THE SEARCH WARRANT ON ITS FACE DID NOT CONFORM TO THE AFFIDAVIT, AND THE SEARCH WARRANT ON ITS FACE WAS GENERAL, OVERBROAD AND UNSPECIFIC.

The search warrant issued in the instant case, which authorized the seizure

of the film "Deep Throat," as evidence in the City of New Orleans' criminal prosecution of petitioner failed to satisfy the Fourth and Fourteenth Amendments' requirement of probable cause. The affidavit upon which the search warrant was based did not sufficiently set forth facts justifying probable cause that an obscene movie, as "obscene" is defined by Municipal Ordinance No. 828 MCS 42-46 of the New Orleans Code existed.

The Municipal Ordinance defines "obscene" as follows:

A. "OBSCENE" means that:

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; and

2. the work depicts or describes actual or simulated acts of human sexual intercourse, sodomy,

> bestiality, oral copulation, masturbation, excretory functions or lewd exhibition of the genitals; and
>
> 3. the work, taken as a whole, lacks serious literary, artistic, political or scientific value. (emphasis added).

The language of the Ordinance mandates the presence of all three elements before a motion picture can be considered "obscene". But, the affidavit (which may be found in Exhibit D, at page 66) failed to establish or even to assert the existence of elements 1 and 3. The issuance of the search warrant (which may be found in Exhibit D, at page 79) therefore, was not justified by the facts alleged in the affidavit. Its issuance must have thus been based upon either facts outside the affidavit, or upon suspicious, beliefs, or unsubstantiated conclusions

by the magistrate who signed the warrant.

This Court has repeatedly emphasized that, under the Fourth Amendment, a search warrant may not issue unless the issuing officer "can find proabble cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." Nathanson v. United States, 290 U.S. 41, 47(1933). For later Court approval of this principle, see Spinelli v. United States, 393 U.S. 410 (1969); Aquilar v. Texas, 378 U.S. 108 (1964); and Giordenello v. United States, 357 U.S. 480 (1958).

In assessing the adequacy of the affidavit in support of the issuance of a valid search warrant, the magistrate is confined to the "four corners" of

the affidavit. His determination must be made from facts alleged at the time the warrant is issued, and not from facts discovered after the search has been conducted or from matters which were within his knowledge but which were not put before him; the hindsight of success cannot weigh in the determination of probable cause. Aquilar v. Texas, supra.

The affidavit challenged by the petitioner contained no facts which could have supported the barest conclusion that probable cause existed to issue the search warrant in the instant case, because two of the three elements required by Municipal Ordinance No. 828 MCS 42-46, relative to obscenity were missing from said affidavit.

Evaluation of the affidavit and the

search warrant discloses that the issuance of the warrant itself was unjustifiable in light of Fourth Amendment and that its validity was suspect. Thus, the judgment of the trial court overruling petitioner's motion to suppress the evidence seized under a defective search warrant, as well as its subsequent judgment of conviction should be reversed.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted the decisions of the Court below are erroneous. A City Ordinance which places criminal sanctions upon acts of expression, in the name of "contemporary community standards", while it denies those sanctioned the opportunity to assess community values through the judgment of its

representatives - the jury, is constitutionally repugnant. Likewise, the constitutionality of a search warrant issued either without reliance upon a complete affidavit, or with reliance on assumptions about facts outside of the affidavit is doubtful.

The present petition for a writ of certiorari should therefore be granted.

RESPECTFULLY SUBMITTED:

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DALE C. WILKS

RITTENBERG & WILKS
Attorneys at Law
2-3-4 Loyola Avenue,
Suite 819
New Orleans, Louisiana
70112

CERTIFICATE

I certify that a copy of the foregoing application has been served upon the opposing counsel by placing same in the United States Mail, properly addressed, with adequate postage affixed thereto.

WILLIAM E. RITTENBERG

APPENDIX A - PRELIMINARY RULINGS
OPINION OF MUNICIPAL COURT
FOR THE CITY OF NEW ORLEANS

MUNICIPAL COURT

CITY OF NEW ORLEANS

NO: 149-117 SECTION "C" DOCKET NO:

CITY OF NEW ORLEANS

versus

JAMES CALDWELL

FILED: June 18, 1974 s/Clarence Molsmarn
DEPUTY CLERK

O R D E R

After considering the motions to quash, memorandums filed by counsel and oral argument concerning the constitutionality of Municipal Ordinance No.828 M.C.S. 42-46:

IT IS ORDERED that the ordinance is constitutional, the motions to quash are denied;

IT IS FURTHER ORDERED that the trial

in this matter will be stayed for 48 hours or until June 21, 1974, so that the defendant may apply to the Supreme Court of Louisiana for writs of certiorari, prohibition and mandamus and a stay order.

NEW ORLEANS, LOUISIANA, this 18th day of June, 1974.

s/ Joseph R. Bossetta
J U D G E

JUDGMENT OF SUPREME COURT OF LOUISIANA

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

CITY OF NEW ORLEANS June 21, 1974

V.

JAMES CALDWELL No. 54,932

- - - - -

In re: James Caldwell, applying for Writs of Certiorari, Prohibition, Mandamus and Stay Order.

- - - - -

Writ denied. The application is premature. Applicant has not exhausted his remedy in the Court below. See La. Constitution Art. VII §94(i)

/s/ FWS

/s/ JWS

/s/ MEB

/s/ AT Jr.

/s/ JAD

/s/ WFM

CALOGERO, J. I dissent from the refusal to grant this writ. Our supervisory jurisdiction permits by passing appeal to the Criminal District Court. I would grant the writ and examine the City of N.O. obscenity ordinance (for Constitutionality) without additional delay.

A TRUE COPY

Clerk's Office

Supreme Court of Louisiana

New Orleans

June 21, 1974

/s/ Phil Trice
Deputy Clerk

OPINION OF MUNICIPAL COURT

FOR THE CITY OF NEW ORLEANS

MUNICIPAL COURT

CITY OF NEW ORLEANS

NO:149-117 SECTION "C" DOCKET NO:

CITY OF NEW ORLEANS

versus

JAMES CALDWELL

FILED:_____ _____
DEPUTY CLERK

O R D E R

Having considered the opinion of the Louisiana Supreme Court Number 54,932, denying defendant's application for Writs of Certiorari, Prohibition, Mandamus and Stay Order on the grounds that such application was premature and applicant had not exhausted his remedy in the Court below by taking Writs of Review to the Criminal District Court

for the Parish of Orleans pursuant to Louisiana Constitution Article 7 §94(i) and upon consent of both parties in the above entitled and captioned matter:

IT IS ORDERED that the trial in this matter be stayed until Tuesday, June 25, 1974, at 4:00 o'clock P.M., so that the defendant may apply to the Criminal District Court for the Parish of Orleans for Writs of Certiorari, Prohibition, Mandamus and a Stay Order.

NEW ORLEANS, LOUISIANA this ____ day of June, 1974.

June 24, 1974

s/ Joseph R. Bossetta
J U D G E

OPINION OF CRIMINAL DISTRICT COURT

FOR THE PARISH OF ORLEANS

6-24-74 The Court this day denied the Defendant's Application for Writs of Certiorari, Prohibition, Mandamus and for a Stay Order.

s/ Angelo J. Gondusa
Min. Clerk

Clerk's Office 6/24/74

A TRUE COPY

(Signature illegible)
Deputy Clerk
Criminal District Court
Parish of Orleans

OPINION OF SUPREME COURT OF LOUISIANA

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

CITY OF NEW ORLEANS July 1, 1974

V.

JAMES CALDWELL No. 54,957

- - - - -

In re: James Caldwell, applying for Writs of Certiorari, Prohibition, Mandamus and for a Stay Order.

- - - - -

Application denied; there has been no final conviction and sentence, followed by exhaustion of appellate procedures. The application is premature.

/s/ JAD

/s/ JWS

/s/ FWS

/s/ MEB

/s/ AT Jr.

/s/ WFM

CALOGERO, J., dissents from refusal to grant this writ.

A TRUE COPY

Clerk's Office

Supreme Court of Louisiana

New Orleans

July 1, 1974

s/ Phil Trice
Deputy Clerk

APPENDIX B - OPINION OF MUNICIPAL COURT FOR THE CITY OF NEW ORLEANS

THE COURT:

Let me make some observations, first before I give my ruling. The whole thing that has stuck in the back of my mind and we've discussed all along is whether or not the City could bear the burden of proving what community standards are. My reflection would be the same as what Mr. Loeffelholz has just said. To me your community standard is what is enacted either locally through your council or through your State Legislature. Now, when your City Council enacts an ordinance and has a hearing, it affords the community an opportunity to express itself. These gentlemen are elected by the citizens of this City and this ordinance was

passed prior to the expiration date of these councilmen, so there's no question these were duly elected councilmen. They were sitting as elected officials, they had an ordinance presented to them, they had the public testify as to what they thought should be in the ordinance and what should not be in the ordinance. It was passed. To me this is setting up a community standard. Then, it's like anything else, it then gets to where it's in the Court and the Court must decide if the person who has violated the law does or does not fit within that ordinance,and I think that's what we're presented with here today, I think the only way we can really do it is to do what we did, is to view the film. This is not something where you have a literary work where you can sit

down and people can interpret it differently. There's no way you can misinterpret what was on that screen. To me it was a vivid picture, there was no way in which you could draw any conclusions other than what you saw there. There was no double meaning and I think that this City has established a standard, I think, as Dr. Koenig has said, when there is no study of that standard, we must take the standard as it exists. And I think that you have to look at, and I think the word that we have to rely on is as it appears in the ordinance. Does it have serious literary, artistic or social impact. I think if you take the movie, "Deep Throat" in its entirety, as you must, you cannot single out one act and say this is hard core pornography. The whole film must

fall. I think that the film, per se, is hard core. I think they've dressed it up, they've added some fringes to it to try to give it some class, but I don't think they have as a whole made this a literary work of either literary, artistic, social or scientific value. I agree with Mr. Renfro from the Times-Picayune, the films have come a long way from the original stag film, but I don't think they're to the point, where taken as a whole, they are serious works. I think that if you take Miss deVincent's testimony as to what you look for when you are evaluating a film, the technical, the plot, the continuity, the theme, the acting ability and the direction, I think if you look at all of these there is improvement. But I don't think as a whole it is a serious work to be con-

sidered, and I would leave you with just saying that by taking a Ford and putting a Cadillac emblem on it, you can't pass it off as a Cadillac. Therefore, it is the ruling of this Court, sir, that your client is guilty of violation of Ordinance No. 828 M.C.S.,Section 42, paragraph 46, relative to obscenity by exhibiting an obscene motion picture.

MR. LOEFFELHOLZ:

Your Honor, before you go any further, I neglected to do this, the City would move to offer certified copies, Xerox copies of the warrant and the affidavit. This is the official copy which was returned to the Vice Squad.

THE COURT:

All right, I have no objection, just as I told Council for the defendant, he

would have the right if he wishes to Xerox that portion of the book that he wishes to place in evidence.

THE COURT TO MR. RITTENBERG:

Q. Let me ask you this, do you want to delay sentencing?

A. No, Your Honor, we're ready for sentencing.

THE COURT:

Before I sentence him, do you want to make any Motions?

MR. RITTENBERG:

We move for an appeal, Your Honor, and as the defendant has already placed a cash bond of Five Hundred Dollars, which is five times the amount of the normal bond, we ask that that bond be used instead as an Appeal Bond. This is a cash bond so there is no question.

THE COURT:

THE COURT:

As cash bond, no problem. Are you ready for sentencing?

A. Yes, Your Honor.

D E C I S I O N

Mr. Caldwell, sir, as I understand through your counsel, you are ready for sentencing at this time is that correct?

A. Yes, Your Honor.

Q. How old are you?

A. Twenty-five (25).

It is the sentence of this Court, sir, that you pay a fine of One Hundred dollars ($100) and serve Ninety (90) days in jail. I am allowing you to remain on the same bond. I'm going to grant the appeal, and you're going to be released under that same bond. Let me say this, don't leave the City of New Orleans with out notifying your

counsel and don't change your address without notifying your counsel and the Court.

MR. LOEFFELHOLZ:

Q. May we ask for the present address?

COURT TO DEFENDANT:

Q. What is your address?

A. 2221 Houma, Apartment 239, in Metairie.

C E R T I F I C A T E

I hereby certify the above and foregoing to be a true and correct transcript of testimony and notes of evidence in the above numbered and entitled cause.

New Orleans, Louisiana, July 31,1974.

s/ Philip S. Brooks
PHILIP S. BROOKS,
JUDGE-AD-HOC

s/ Claire D. Adams
MRS. CLAIRE D. ADAMS,
STENOGRAPHER

OPINION OF CRIMINAL DISTRICT COURT
FOR PARISH OF ORLEANS

No. 244-524 James E. Caldwell Appeal

MINUTE MEMO

12-4-74 Mr. Dale C. Wilks, counsel for Appellant, argued his case before the Court. The Matter was then submitted to the Court. The Court in due consideration of the law & the evidence, affirmed the conviction and Sentence by the Lower Court and ordered the Sentence carried into full and entire execution. Mr. Wilks informed the Court of his intention to apply for Writs to the Supreme Court for State of La. Court granted time until 12-16-74 to file Writs at 10:00 a.m.

s/ George W. Platt,M.C.,"B"

CLERK'S OFFICE 12-13-1974
A TRUE COPY
s/ Harold Ray, Deputy Clerk,
Criminal District Court,
Parish of Orleans

ORDER OF THE CRIMINAL DISTRICT COURT
FOR THE PARISH OF ORLEANS

CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 244-524 SECTION "B"

CITY OF NEW ORLEANS

versus

JAMES CALDWELL

FILED:_____ _____
DEPUTY CLERK

MOTION TO STAY IMPOSITION OF SENTENCE

NOW INTO COURT comes the defendant-appellant, James Caldwell, who through the undersigned counsel respectfully represents that:

1) Oral argument and judgment in the appeal of the above captioned matter was heard by this court on December 4, 1974, at which time the judgment of the Municipal Court for the City of New Orleans convicting defendant-appellant of violating Municipal Ordinance No. 828 MCS 42-46,

relative to obscenity, was affirmed.

2) Upon rendition of judgment this court granted the defendant-appellant until Monday, December 16, 1974, to file Writs of Certiorari to the Louisiana Supreme Court in this matter.

3) On this day, Friday, December 13, 1974, counsel for the defendant-appellant has received a notice of sentence from the Municipal Court for the City of New Orleans.

4) The defendant-appellant respectfully requests this court to stay the sentencing until counsel for James Caldwell has had an opportunity to file writs with the Louisiana Supreme Court.

WHEREFORE, the defendant-appellant, James Caldwell, moves that this court grant a stay of sentencing issued to the Municipal Court for the City of New Orleans until such time as the defendant-appellant has been granted by this court to file Writs of Certiorari with the Louisiana Supreme Court.

RESPECTFULLY SUBMITTED:

s/ William E. Rittenberg
WILLIAM E. RITTENBERG

s/ Dale C. Wilks
DALE C. WILKS

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ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 13th day of December, 1974.

s/ Dale C. Wilks

O R D E R

Having considered the above and foregoing motion of defendant-appellant

to stay imposition of sentence by the Municipal Court for the City of New Orleans in this matter,

IT IS HEREBY ORDERED that the imposition of sentence be and is hereby stayed until the time has lapsed for the defendant-appellant to file Writs of Certorari to the Louisiana Supreme Court as mandated by the judgment of this court on December 4, 1974.

IT IS FURTHER ORDERED that should defendant-appellant file Writs of Certorari within the time allotted by this court all proceedings with regard to imposition of sentence shall be stayed until the Louisiana Supreme Court has made a determination whether to accept or deny Writs of Certorari in this matter.

NEW ORLEANS, LOUISIANA, this 13th day of December, 1974.

s/ Judge Braniff
J U D G E

OPINION OF SUPREME COURT OF LOUISIANA

SUPREME COURT OF LOUISIANA

New Orleans, 70112

CITY OF NEW ORLEANS January 10,1975

V.

JAMES CALDWELL No. 55,666

- - - - -

In re: James Caldwell, applying for writs of Certiorari

- - - - -

Application denied; there is no merit in the Assignments of error.

/s/ JAD

/s/ JWS

/s/ FWS

/s/ AT Jr.

/s/ WFM

BARHAM, J., concurs in the denial under the limited assignment of errors.

A TRUE COPY

Clerk's Office

Supreme Court of Louisiana

New Orleans

January 10, 1975

s/ Phil Trice
Deputy Clerk

OPINION OF SUPREME COURT OF LOUISIANA

DOCKET NUMBER: 55,666

SUPREME COURT

STATE OF LOUISIANA

CITY OF NEW ORLEANS

versus

JAMES CALDWELL

ORDER FOR SUPERSEDEAS, STAY OF EXECUTION AND STAY AND RECALL OF MANDATE AND STAY AND ARREST OF JUDGMENT

On consideration of the petition and motion of James Caldwell, defendant-appellant in the above numbered and entitled cause:

IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed, and arrested pending and until the 21st day of

February, 1975, in order to permit James Caldwell to seek a writ of certiorari from the Supreme Court of the United States.

* * * * *

NEW ORLEANS, LOUISIANA, this 22 day of January, 1975.

JOE W. SANDERS, Chief Justice, Supreme Court of the State of Louisiana.

s/ Joe W. Sanders

OFFICE OF THE CLERK

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

January 22, 1975

Harold A. Moise,Jr.
Clerk

Telephone
527-8161

Andrew J. Falcon
Phil Trice
Deputy Clerks

Dale C. Wilks, Esq.
Rittenberg & Wilks, Esqs.
Attorneys at Law
234 Loyola Avenue, Suite 819
New Orleans, Louisiana 70112

Re: No. 55,666
City of New Orleans v.
James Caldwell

Dear Mr. Wilks:

The Court today issued a stay of the judgment in the above entitled matter, this order reading as follows:

"On consideration of the petition and motion of James Caldwell, defendant-appellant in the above numbered and entitled cause:
IT IS ORDERED that the execution and mandate and enforcement of the

judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed, and arrested pending and until the 21st day of February, 1975, in order to permit James Caldwell to seek a writ of certiorari from the Supreme Court of the United States."

You will note that this stay is only to permit you to file your writ with the United States Supreme Court within the time permitted, any further stay thereof will have to be obtained from the United States Supreme Court.

If you have any questions, please ask me.

With kindest regards, I am,

Yours very truly,

s/ Harold A. Moise, Jr.
C L E R K

HAMjr:db
ccs: Hon.Blake Arata
Joel P. Loeffelholz,Esq.
Mr. Dan Kelly, Esq., Clerk
(Your No. 149,117)
Mr. Edwin A. Lombard, Esq., Clerk
(Your No. 244-524)

APPENDIX C

MUNICIPAL ORDINANCE NO. 828 MCS 42-46
OF THE CODE OF NEW ORLEANS

O R D I N A N C E

CITY OF NEW ORLEANS

CITY HALL June 28, 1973

CALENDAR NO. 5655

NO. 5242 MAYOR COUNCIL SERIES

BY: COUNCILMAN JOSEPH V. DiROSA
(BY REQUEST)

AN ORDINANCE TO AMEND AND REORDAIN Section 42-46 of Ordinance Number 828 M.C.S., known as the Code of New Orleans, relative to Obscenity - Offenses defined and prohibited.

SECTION 1. THE COUNCIL OF THE CITY OF NEW ORLEANS, HEREBY ORDAINS, That Section 42-46 of Ordinance Number 828 M.C.S., known as the Code of New Orleans, relative to "Obscenity - Offenses defined and prohibited", be, and the same

is hereby amended to read as follows:

Section 42-46. Sale and Distribution of Obscene Material.

It is unlawful for any person to knowingly send or cause to be sent, bring or cause to be brought into the Parish of Orleans for sale or distribution, or in this Parish prepare, publish,print, exhibit, distribute or offer to distribute, or have in his possession with intent to distribute or to exhibit or offer to distribute any obscene material."

Definitions:

A. "Obscene" means that:

1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; and

2) the work depicts or describes actual or simulated acts of human sexual intercourse,

sodomy, bestiality, oral copulation, masturbation, excretory functions or lewd exhibition of the genitals; and

3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

B. "Material" means any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, motion picture or other pictorial representation.

C. "Person" means any individual, partnership, firm, association, corporation or other legal entity.

D. "Distribute" means to transfer possession of, whether with or without consideration.

E. "Knowingly" means having general knowledge of or having reason to know or a belief or reasonable grounds for belief which warrants further inspection or inquiry or both of the character

and content of any material described herein which is reasonably susceptible of examination by the defendant.

Section 42-46.1 Public Displays of Explicit Sexual Material.

A. Purpose. It is the purpose of this Section to prohibit the public display of explicit sexual material, in order to protect persons from involuntary exposure to such materials.

B. Offense Defined. A person is guilty of a misdemeanor if he knowingly fails to take prompt action to remove the public display of explicit sexual material from property in his possession.

C. Definitions:

1) "Explicit sexual material" means any picture, drawing, photograph, motion picture, or other pictorial representation, which depicts

actual or simulated acts of human sexual intercourse, sodomy, bestiality, oral copulation,masturbation, excretory functions, torture in the context of a sexual relationship, or exhibition of the genitals.

2) "Public display" is material that is visible on a billboard, viewing screen, theatre marquee, newsstand, display rack, window, showcase, display case or other similar display area that is visible from a public street, sidewalk, park or other public place or from the property of others.

3) "Knowingly" means having general knowledge of or having reason to know or a belief or reasonable grounds for belief which warrants further inspection or inquiry or both of the character and content of any material described herein which is reasonably susceptible of examination by the defendant.

Section 42-46 2. Sale and Display of Explicit Sexual Material to Young Persons.

A. Purpose. It is the purpose of

this Section to regulate the direct distribution of certain explicit sexual materials to young persons in order to aid parents in supervising and controlling the access of children to such material.

B. Offenses Defined. A person is guilty of a misdemeanor if he:

1) knowingly disseminates explicit sexual material, as hereinafter defined, to young persons, or

2) knowingly displays explicit sexual material in an area to which young persons have access, unless such material, taken as a whole, has serious artistic, literary, historical, scientific, medical, or educational value.

3) Subsection B does not apply to a parent, guardian

C. Definitiong:

1) "Young persons" means any unmarried person less than eighteen (18) years of age.

2) "Explicit sexual material" means:

a. any picture, drawing, photograph, motion picture or other pictorial representation of uncovered human genitals, of human sexual intercourse, sodomy, oral copulation, bestiality, masturbation or direct physical stimulation of clothed or unclothed genitals, of torture in the context of a sexual relationship, or any description of, advertisement of or offer to sell such pictorial material where such description or advertisement includes such materials; or

b. any artificial human penis or vagina or device primarily designed physically to stimulate genitals, or any description, advertisement or offer to sell or distribute such an artificial organ or device where such description or advertisement presents either a pictorial representation or a detailed verbal description of such organ or device or its manner of use; or

c. any book, magazine, newspaper or other printed or written material, which is made up in whole or in dominant part of depictions or descriptions of human sexual intercourse, oral copulation, bestiality, sodomy, mastur-

bation or torture in the context of a sexual relationship.

3) "Disseminate" means to transfer possession of, whether with or without consideration.

4) "Knowingly" means having general knowledge of or having reason to know or a belief or reasonable grounds for belief which warrants further inspection or inquiry or both of the character and content of any material described herein which is reasonably susceptible of examination by the defendant.

Section 42-46.3 Obscene Live Conduct.

It shall be unlawful for any person to knowingly engage or participate in, manage, produce, sponsor, present or exhibit obscene live conduct,which production, performance or exhibition, when taken as a whole, lacks serious literary, theatrical or artistic value, to or before an audience consisting of at least one person or spectator on any street, sidewalk, park or other

public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged or whether or not attendance is conditioned upon the presentation of a membership card.

Definitions:

A. "Obscene live conduct" is:

1) the actual or simulated performance of acts of human sexual intercourse, masturbation, sodomy, bestiality, oral copulation or excretory functions; or

2) the actual or simulated touching, caressing, or fondling of the anus, genitals or female breast; or

3) the actual or simulated displaying of the pubic hairs, anus, vulva, genitals or nipples of the female breast.

B. "Knowingly" means having general of or having reason to know or a belief

or reasonable grounds for belief which warrants further inspection or inquiry or both of the character of any conduct described herein.

ADOPTED BY THE COUNCIL OF THE CITY OF NEW ORLEANS AUG 30, 1973.

JOSEPH V. DI ROSA
PRESIDENT OF COUNCIL

Delivered to the Mayor on Aug 30, 1973

Approved: Sep. 4, 1973

MOON LANDRIEU
MAYOR

Returned by the Mayor on Sep 4, 1973 at 10:50 AM.

JOSEPH C. PETERSON,
CLERK OF COUNCIL

ITEM NO:E-8249-74

APPENDIX D

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

MUNICIPAL COURT OF NEW ORLEANS
STATE OF LOUISIANA

APPLICATION FOR SEARCH WARRANT

PERSONALLY CAME AND APPEARED BEFORE ME, the undersigned Judge of the Municipal Court of New Orleans, Parish of Orleans, State of Louisiana, Det. Richard Hart, Vice Crimes Section, employed by the New Orleans Department of Police, 715 South Broad Street, New Orleans, Louisiana, WHO, after being duly sworn by me, deposed and said:

THAT a search warrant should be issued for the search of the following described (premises) better known as The Cinema 16 Adult Movie Theatre; Municipal Number: 1014 Canal Street

Type of Occupancy:(Commercial) Movie Theatre House

Structure: Green Masonry & Glass Front Building, see details below*

Number of Stories: Appears to be four(4)

Apartment Number: None

FOR the purpose of seizing the following described property:

#1-The currently featured film entitled 'Deep Throat'

#2-Mechanisms used in the display of this film

#3- Records reflecting the ownership of the businesss

#4--Records reflecting the employees of the business

THE reasons and facts for the request of this search warrant are: See attached sheets of probable cause for the reason and facts.

*This movie theatre shares the common address of 1014 Canal Street with the Magic Touch Massage Parlor.

1847 s/ Det. Richard Hart
Badge Number Affiant

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 10th day of May
1974, AT NEW ORLEANS, LOUISIANA

s/ PHILIP S. BROOKS
JUDGE, OF THE MUNICIPAL COURT
SECTION "C"

NOPD Form 117-D (Rev.7/73)

On Thursday, May 9, 1974, at about 8:00 PM, Vice Detectives Richard Hart and Lawrence Chaisson had occasion to enter the Cinema 16 Movie Theater located at 1014 Canal St. Upon ascending and decending numerous flights of stairs, the officers found themselves at what appeared to be a cashiers booth occupied by an unknown white male. At this time, Det. Hart paid the admission price of $10.00 for both he and Det. Chaisson. Afterwards, the officers entered the movie auditorium and took seating.After a short time the currently featured film began to show.

It begins by showing a white female walking near a canal. She then enters a blue and white cadillac and begins to drive.At this point the title is shown on the screen, "Deep Throat". While she is driving the names of the cast and others are shown on the screen. As the last names are shown, the female is driving up to a residence. She then gets out of the car and enters the residence. Upon entering there is another female having an act of cunnilingus performed on her by a white male identified as the delivery boy. The first female is then identified as Linda Lovelace. Linda then leaves and the other female continues to have cunnilingus performed on her by the male. At all times, the contact was shown as well as the insertion of the males tongue into the

female's vagina. This continued for a while until the scene changed. The next scene shows Linda sitting besides a pool and the other female swimming. The other female alights from the pool and they begin talking. Linda explains that she has a problem with sex that she does not hear any bells or see any explosions when having intercourse. The other female then tells her that what she needs is to have more sex and that she will line it up. The scene then changes back to the house where two males are driving up. The males enter the house and are greeted by the other females. She gives them a piece of paper with the numbers 11 and 12 on them and tells them that there number will be called. The scene then changes to a bedroom where Linda is in a bed and a white male

is having intercourse with her. (The penetration is clearly shown). The scene then moves to another room where the other female is having intercourse with one male while performing the act of fellatio on another male. The male having intercourse is shown to ejaculate on her buttocks then continue to perform the act of fellatio on the other male. The scene then goes back to Linda where she is performing an act of fellatio on a different male. This continued for a while. She then has intercourse with the male. The penetration of the penis into the vagina is clearly seen at all times. The scene then changes back to the living room where the other female is sitting on a sofa with two males. A third male then enters the scene and asks who is number 11 and

tells him that it is his turn, however the subject refuses. At that point another male enters the room. This male is reputed to be a homosexual. After making his remarks, he leaves and the scene ends.

The next scene shows Linda and the other female walking. Linda is telling the other female that she still did not hear any bells nor see and explosions. The other female then recommends that she go to Dr. Young, a psychiatrist and maybe he could help her. The scene then changes to the doctor's office where the doctor is talking to Linda. Linda is explaining her problem to the doctor. After a short discussion the doctor asks her if she has ever been examined inside. He then takes her into another room where he tells her to remove her pants

so that he can examine her. After removing her pants, Linda set on a bed and the doctor began to examine her by opening the lips of her vagina with his fingers and looking into her vagina with a small telescope. After looking at her he tells her that she does not have a clitorus. She then begans to cry. The doctor then asks her if she enjoys sex and how is she most satisfied. She explains that she is most satisfied when performing oral copulation. The doctor then looked into her throat and tells her that her clitoris is in her throat and that she will hear the bells and see the explosions if she uses deep throat. He explains that she must allow the penis to go deep into her throat to be satisfied. He then tells her to try it on him. Linda then commits an act of

fellatio on Dr. Young. The penetration is clearly seen. When the doctor reached a climax, Linda hear bells, saw rockets and heard explosions.Linda then tells the doctor that he is the only one who has ever satisfied her and she wants to marry him.The doctor tells her that he cannot, but that he will make her his physical therapist. The sequence then changes to show the doctor having intercourse with his nurse while recording on tape what he has assigned Linda to do. The scene then changes to show Linda entering an apartment where a white male was seated, She then removed her clothing and began to perform an act of fellatio on him. After a while Linda sat on the table and the male began to have anal intercourse with her. A short time later, the male inserted a small

glass tube into the vagina. He then poured some liquid from a wine bottle into the tube and began sucking it out with a long tube. He then obtained a can of coke and poured some into the tube and drink some with the tube. He then gave some to Linda. This scene ended as the music was playing things go better with coke. The next scene was of the doctor and the nurse. The nurse was performing fellatio on the doctor while he was recording the next assignment for Linda. The scene then shows Linda entering a motel and meeting an elderly white male. Linda then begins to remove her clothing and the scene goes back to the doctor where he and the nurse are having intercourse. The scene then goes back to the motel where Linda is getting dressed. The next scene shows Linda and

the doctor. The doctor was having intercourse with Linda. For the next ten (10) minutes the scene alternated from the doctor and Linda to the doctor and Linda to the doctor and the nurse in various acts of fellatio cunnilingus and intercourse, both anal and vaginal. During this scene the doctor becomes tired and is shown in bed. As Linda comes in she removes the bandage and performs an act of fellatio on the doctor. The ejaculation is shown to occur in her mouth. The next scene shows the doctor performing an act of cunnilingus on the nurse while she is recording what Linda's next assignment was. The scene then changes to show Linda shaving her genital area. At this point a while male enters. He is wearing a mask over his face and is holding a gun. When Linda completes shaving

she comes out and the subject grabbed her and tells her that he is going to rape her. When he agrees, he becomes upset and Linda then tells him that she loves him and he asks her to marry him. She tells him that she cannot because the man she marries must have a nine (9) inch penis. The subject then says that he is only four (4) inches away from happiness. Linda suggests that he call the doctor for help. He then calls the doctor and explains the problem. The doctor tells him that he can help him. He hangs up the phone and tells Linda that the doctor can make his penis average size and that he will only have to cut off four (4) inches. Linda then performs an act of fellatio on him and the ejaculation is shown to occur in her mouth as the film comes to an end.

It should be noted here that the film appeared to be a 16mm color movie with sound track consisting of both narrative and music. Due to the poor sound, sometimes the narrative could not be understood. Also this movie was shown in two parts.

Det. s/ Richard Hart 1847
AFFIANT BADGE NUMBER

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 10th DAY OF MAY
1974, AT NEW ORLEANS, LOUISIANA

s/ PHILIP S. BROOKS
JUDGE OF THE MUNICIPAL
COURT-SECTION "C"

SEARCH WARRANT
MUNICIPAL COURT OF NEW ORLEANS
STATE OF LOUISIANA

Case No:_____ Item No: E-8249-74

S E A R C H  W A R R A N T

ORDER OF SEARCH

TO: THE SUPERINTENDENT OF THE NEW ORLEANS DEPARTMENT OF POLICE and/or HIS DESIGNATED REPRESENTATIVES:

AFFIDAVIT(S) HAVING BEEN MADE BEFORE ME BY Det. Richard Hart assigned to the Vice Crimes Section of the New Orleans Police Department

THAT he has good reason to believe that on or in the (premises) located at 1014 Canal Street, better known as the Cinema 16 Adult Movie Theatre within the Parish of Orleans, State of Louisiana as more fully descsribed in the application for this warrant,there is now being concealed certain property, namely, the currently featured film entitled

'Deep Throat', mechanisms used in the display of this film, records reflecting ownership of the business, and records reflecting the employees of the business

WHICH said property constitutes evidence of the violation of Ordinance 828-MCS Section 42:46 of the Code of the City of New Orleans, and as I am satisfied from the affidavit(s) submitted in support of the application for this warrant that there is probable cause to believe that the aforesaid property is being concealed on or in the (premises) above described, and that the aforesaid grounds for issuance of this search warrant exist.

YOU ARE HEREBY ORDERED to search forthwith the aforesaid (premises) for the property specified, serving this

search warrant and making the search, and if the property be found there, to seize it, leaving a copy of this warrant a a receipt for the property seized,to make your written return on this warrant including a written inventory of the property seized, and to bring the said seized property into the court (before the judge, the clerk, the sheriff, or any court officer who usually acts as the custodian)within ten (10) days of this date as required by law.

YOU ARE AUTHORIZED to execute this warrant and to make this search during the daytime or the nighttime and if the property herein described be found on the (premises) herein described to seize said property in accordance with law.

YOU ARE AUTHORIZED to execute this warrant and to make this search on a

Sunday and if the property herein described be found on the (premises) herein described to seize said property in accordance with law.

THIS WARRANT MADE IN DUPLICATE ORIGINAL, NEW ORLEANS, LOUISIANA, THIS 10th DAY OF MAY 1974.....

s/ PHILIP S. BROOKS
JUDGE, SECTION "C"
MUNICIPAL COURT OF NEW ORLEANS

COPIES:
- Original - Unit File
- 1st Copy - Judge signing warrant (except when used in CDC)
- Copy - Judge signing warrant when used in CDC
- Copy - Person upon whom warrant is served
- Copy - Police Record Room
- Copy - Judge signing warrant when making return

NOPD Form 117-C (Rev. 7/73)

Item No: E-8249-74

RETURN ON SEARCH WARRANT

At 4:40 PM o'Clock on May 10th,1974, I,the undersigned member of the New Orleans Department of Police, executed the foregoing SEARCH WARRANT as follows: I searched the premises described in the SEARCH WARRANT, and I left a copy of the said SEARCH WARRANT with: JAMES E. CALDWELL, W/M 25 together with a receipt for the items seized.

THE following is an inventory of property seized pursuant to the said foregoing SEARCH WARRANT:

One City Occupational License #J17596

One Welfare Tax Permit for Amesements # 5432

One City Sales Tax Registration Certificate #30-0708-98805-4

One State Department of Revenue Tax Receipt #64255

One Cashier's Daily Report

One white cardboard sign with red lettering

Two metal 16 MM film reels containing the motion picture 'Deep Throat'

One empty 16 MM film reel

One Belle and Howell 16 MM Motion picture projector

Names of Persons Arrested:

Richard E. Caldwell

Names of Persons Wanted:

None at this time

THIS inventory was made in the presence of: Investigating officers AND arrested subject

THIS RETURN MADE IN DUPLICATE ORIGINAL

THIS 10th DAY OF May 1974,NEW ORLEANS, LOUISIANA.....

s/ Det. Richard Hart Badge No: 1847

NEW ORLEANS DEPARTMENT OF POLICE

COPIES:

Original - Unit File

1st Copy - Judge signing Warrant

Copy - Person upon whom Warrant is served

Copy - District Attorney

Copy - Police Record Room

LIBRARY
SUPREME COURT, U. S

Supreme Court, U. S.
FILED
FEB 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1062

JAMES CALDWELL,

Petitioner,

versus

CITY OF NEW ORLEANS,

Respondent.

---

Application for Supersedeas and Stay

---

WILLIAM E. RITTENBERG
DALE C. WILKS
RITTENBERG & WILKS
Attorneys At Law
Suite 819,
2-3-4 Loyola Avenue
New Orleans, Louisiana
70112

ATTORNEYS FOR PETITIONER

# I N D E X


Page No.

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Verification ..... 3

Order for Supersedeas, Stay of Execution and Stay of Mandate and Stay and Arrest of Judgment..... 5

Appendix A

Judgment of the Supreme Court of Louisiana..... 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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NO.

---

JAMES CALDWELL,

Petitioner,

versus

CITY OF NEW ORLEANS,

Respondent.

---

Application for Supersedeas and Stay

---

TO THE HONORABLE JUSTICE POWELL OF THE SUPREME COURT OF THE UNITED STATES:

The petition and motion of James Caldwell, with respect represents and shows that:

I.

Pursuant to Rules 27, 50 and 51, of

the Revised Rules of the Supreme Court of the United States, Petitioner prays that the execution, mandate and enforcement of the Judgment of the Louisiana Supreme Court and the courts below, be stayed pending review by this Honorable Court of Petitioner's application for a Writ of Certiorari and final disposition of this matter.

II.

Petitioner applied to the Louisiana Supreme Court for a stay of execution, mandate, and enforcement of its judgment and was granted same until the 21st day of February, 1975, a copy of which is attached as Appendix A.

WHEREFORE, Petitioner prays that this Honorable Court grant his Application for Supersedeas and stay of the execution, mandate, and enforcement of

the Judgment of the Louisiana Supreme Court and the Courts below, pending review by this Court of Petitioner's application for a Writ of Certiorari and final disposition of this matter.

RESPECTFULLY SUBMITTED

WILLIAM E. RITTENBERG

DALE C. WILKS

RITTENBERG & WILKS
Attorneys At Law
Suite 819
2-3-4 Loyola Avenue
New Orleans, Louisiana
70112

ATTORNEYS FOR PETITIONER

V E R I F I C A T I O N

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

WILLIAM E. RITTENBERG

who being by me first sworn did depose and say and certify that he is a member of the law firm of Rittenberg & Wilks and is one of the attorneys for, and is counsel of record for James Caldwell, peititioner and mover herein; that all of the statements of fact in the above and foregoing petition are true and correct to the best of his knowledge, information and belief; that a copy of this petition and motion has been served upon the City Attorney's Office for, the City of New Orleans,Louisiana, by mailing to that office a copy thereof, postage prepaid.

NEW ORLEANS, LOUISIANA, this _____ day of February, 1975.

_____

SWORN TO and SUBSCRIBED

BEFORE ME this _____day

of February, 1975.

_____

NOTARY PUBLIC

ORDER FOR SUPERSEDEAS, STAY OF EXECUTION AND STAY OF MANDATE AND STAY AND ARREST OF JUDGMENT

On consideration of the petition and motion of James Caldwell, Petitioner in above numbered and entitled cause:

IT IS ORDERED THAT THE EXECUTION and mandate and enforcement of the judgment and decree rendered in the above-entitled and numbered cause be, and it is hereby recalled, stayed, and arrested pending and until the ____day of _____, 1975, in order to permit James Caldwell to seek a writ of certiorari from the Supreme Court of the United States and until

the Supreme Court of the United States shall have made its final disposition of this case, and until the disposition of this matter shall have become final.

The order herein granted in conditioned upon James Caldwell furnishing bond with good and solvent surety in the amount of_____ ($ )Dollars, conditioned according to law.

WASHINGTON, D.C., this ____day of _____, 1975

_____,
LEWIS F. POWELL, JR.
Justice, Supreme Court of the United States.

APPENDIX A

OPINION OF SUPREME COURT OF LOUISIANA

DOCKET NUMBER: 55,666

SUPREME COURT
STATE OF LOUISIANA

CITY OF NEW ORLEANS

versus

JAMES CALDWELL

ORDER FOR SUPERSEDEAS, STAY OF EXECUTION AND STAY AND RECALL OF MANDATE AND STAY AND ARREST OF JUDGMENT

On consideration of the petition and motion of James Caldwell, defendant-appellant in the above numbered and entitled cause:

IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed, and arrested pending and until the 21st

day of February, 1975, in order to permit James Caldwell to seek a writ of certiorari from the Supreme Court of the United States.

* * * * * * * * * * * * *

NEW ORLEANS, LOUISIANA, this 22 day of January, 1975.

JOE W. SANDERS, Chief Justice
Supreme Court of the State of Louisiana.

(Signed) Joe W. Sanders

...o0o...

LETTER FROM THE OFFICE OF THE CLERK, SUPREME COURT OF LOUISIANA, NEW ORLEANS, 70112

January 22, 1975

Dale C. Wilks, Esq.,
Rittenberg & Wilks, Esqs.,
Attorneys at Law
234 Loyola Avenue, Suite 819
New Orleans, Louisiana 70112

Re: No. 55,666
City of New Orleans v. James Caldwell

Dear Mr. Wilks:

The Court today issued a stay of the judgment in the above entitled matter, this order reading as follows:

> "On consideration of the petition and motion of James Caldwell, defendant-appellant in the above numbered and entitled cause: IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed, and arrested pending and until the 21st day of February, 1975, in order to permit James Caldwell to seek a writ of certiorari from the Supreme Court of the United States."

You will note that this stay is only to permit you to file your writ with the United States Supreme Court within the time permitted, any further stay thereof will have to be obtained from the United States Supreme Court.

If you have any questions, please

ask me.

With kindest regards, I am,

Yours very truly,

s/ Harold A. Moise, Jr.
C l e r k

HAMJr:db
ccs: Hon. Blake Arata
Joel P. Loeffelholz, Esq.
Mr. Dan Kelly, Esq., Clerk
Mr. Edwin A. Lombard, Esq.,

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 9 1975

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

## No. 74-1062

JAMES CALDWELL,

Petitioner,

versus

CITY OF NEW ORLEANS,

Respondent.

## RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

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No. 74-1062

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JAMES CALDWELL,
Petitioner,

versus

CITY OF NEW ORLEANS,
Respondent.

---

# RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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Respondent, the City of New Orleans, files this response and respectfully moves that the petition for writ of certiorari in this matter be denied and dismissed for the following reasons:

## JURISDICTION

Respondent would respectfully point out to the Court that the judgment of the Louisiana Supreme Court which is complained of was handed down on January 10, 1975 and not January 23, 1974 as stated in petitioner's application at p. 4.

## QUESTIONS PRESENTED*

I.

IS THERE A 6TH AMENDMENT RIGHT TO TRIAL BY JURY IN PROSECUTIONS INSTITUTED UNDER 828 MCS 42-46, 42-46.1, 42-46.2 and 42-46.3 OF THE MUNICIPAL CODE OF THE CITY OF NEW ORLEANS EVEN THOUGH THE MAXIMUM PENALTY POSSIBLE IS A $100.00 FINE AND 90 DAYS IN JAIL OR BOTH?

II.

DOES THE AFFIDAVIT CONTAINED IN THE APPLICATION FOR THE SEARCH WARRANT IN THIS MATTER CONTAIN SUFFICIENT FACTS AND CONTENT TO ESTABLISH PROBABLE CAUSE FOR THE ISSUANCE OF SAID WARRANT?

* Respondent's view of the questions presented differs from petitioner's in that respondent has sought to limit the questions presented to those *actually argued* by petitioner in pages 13-24 of his petition and not to those issues expressed in the form of "Questions Presented" at pages 4 and 5 of his petition but *not* briefed in the body of his argument.

## STATEMENT OF THE CASE

The Statement of the Case as put forth by petitioner is essentially correct; however, respondent would make the following corrections and additions:

In paragraph number 2 petitioner states that the Honorable Judge Bossetta "viewed the film, 'Deep Throat', at an *evidentiary hearing* (emphasis added) and determined it to be obscene".

Respondent would respectfully show that while the hearing referred to is evidentiary in nature, it is actually an "adversary" hearing which is routinely moved for and held within 48 hours of seizure of a film by the Police Department of the City of New Orleans to determine the film's obscenity or non-obscenity as the case may be. See: Motion and Order for Adversary Hearing, Appendix A.

In paragraph number 9 petitioner creates the impression that the Louisiana Supreme Court has stayed execution, mandate and enforcement of sentence pending the outcome of the instant proceeding.

This is simply not the case. As can be seen from the order of the Louisiana Supreme Court and the cover letter thereto from the clerk of said court (Appendix B) petitioner was granted the stay only until February 21, 1975 and any further stay would have to emanate from this Honorable Court after that date. That this is the fact is amply attested to by petitioner himself when he filed, along with the instant petition, a companion application for supersedeas and stay which was denied on February 26, 1975 (Appendix C) and which is now moot for petitioner was directed, after February 21, 1975, to appear in Municipal Court to begin serving his sentence on March 14, 1975 but failed to so appear and is now a fugitive having fled the jurisdiction of the Court.

On March 14, 1975 Mr. Dale Wilks appeared in Municipal Court and orally informed the Court that Mr. Caldwell had fled the jurisdiction and then presented a "Motion to Withdraw as Counsel of Record" since neither he nor Mr. Rittenberg knew the whereabouts of Mr. Caldwell at that time.

After some discussion Mr. Wilks informed the Court that both he and Mr. Rittenberg were withdrawing as counsel for Mr. Cadlwell in all matters pertaining to this case, including the petition to this Honorable Court, and would no longer be representing him in *any* matter whatsoever.

As of this date Mr. Wilks and Mr. Rittenberg have not, to our knowledge, withdrawn from the instant matter as was their expressed intention when they presented their above motion to the Honorable Judge Bossetta.

## ARGUMENT AGAINST GRANTING THE WRIT

### I.

**IS THERE A 6TH AMENDMENT RIGHT TO TRIAL BY JURY IN PROSECUTIONS INSTITUTED UNDER 828 MCS 42-46, 42-46.1, 42-46.2 AND 42-46.3 OF THE MUNICIPAL CODE OF THE CITY OF NEW ORLEANS EVEN THOUGH THE MAXIMUM PENALTY POSSIBLE IS A $100.00 FINE AND 90 DAYS IN JAIL?**

Before any intelligent discussion can be had on this point it must be pointed out that petitioner's brief is in

error at pages 14 and 15 where he attempts to bring this case within the ruling in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) requiring jury trials by flatly stating:

> "(P)etitioner . . . was deprived of his liberty for six (6) months . . ."

and

> ". . . . (T)he maximum penalty for violation of Municipal Ordinance No. 828 MCS 42-46 is imprisonment for six (6) months and/or a fine of $100.00."

Petitioner would have this court believe that he can be deprived of his liberty for 6 months by making the statement quoted above.

As pointed out in undersigned counsel's letter of February 26, 1975 to the Honorable Clerk of this Court (Appendix D) the maximum penalty for violation of *any* municipal ordinance of the City of New Orleans is *90 days* not 6 months, and/or a fine of $100.00 which is provided both in the Home Rule Charter of the City of New Orleans and the Municipal Code itself thusly:

Home Rule Charter:

> "Section 9-306. Penalties for Violations. The Council shall by ordinance provide for punishment of wilful violations of any provisions of this Charter and may provide for punishment of violations of ordinances, rules and regulations, but *it shall not provide for*

*fines of more than one hundred dollars nor for imprisonment for more than ninety days, or both.*" (Emphasis Added).

828 MCS 1-6:

"Section 1-6. General penalty; continuing violations.

Whenever in this Code or in any ordinance of the city any act is prohibited or is made or declared to be unlawful or an offense or whenever in this Code or any such ordinance the doing of any act is declared to be unlawful, when no specific penalty is provided therefor, the violation of any such provision of this Code or any such ordinance shall be punished *by a fine not exceeding one hundred dollars or by imprisonment for not more than ninety days or both such fine and imprisonment.*" (Emphasis Added).

Therefore, it becomes patently obvious that under no circumstances could Mr. Caldwell ever be sentenced to 6 months imprisonment for violation of *any* municipal ordinance of the City of New Orleans.

At pages 16 and 17 of his argument petitioner states that he, as well as the entire city of New Orleans, is deprived of his/their right to free expression by the ordinance in question.

As was most ably pointed out in *Miller* v. *California*, 413 U.S. 15 (1973), and the companion cases

thereto, obscenity, as "defined" by *Miller*, does not fall within the ambit of first amendment protections and therefore States and Cities have the right to regulate and/or prohibit such expression should they so desire upon a "local" level without regard to "national standards".

Petitioner attempts to show that there are no procedural safeguards in the Ordinance for determining community standards and that nothing short of trial by jury in each case will provide such safeguards.

It is respectfully submitted that the ordinance itself is the embodiment of the community standards of the City of New Orleans for it was formulated and passed by the City Council as the result of a whole month of public hearings, after *Miller* was handed down, at which all views were expressed by the left, the right and the middle of the road and ultimately an acceptable draft was reached which is the ordinance as it stands today. See also: Opinion of Municipal Court — Appendix B of petition for certiorari at pages 35-42.

Is this not then the "Community Standard" contemplated by *Miller*?

If we accept petitioner's argument that only a "local jury" can determine community standards, what then is the elected City Council for the City of New Orleans if not the representative of the entire community? What function does it then serve if not the elected representative of the entire city? Are we still not a republic or would counsel for petitioner have the City

of New Orleans become a pure and absolute democracy requiring a meeting of a "local jury" before anything may be accomplished?

We do not feel that it was ever the intention of this court to abrogate the powers of duly elected representatives of the people so long as there is no misuse of that power.

Be all that as it may, the fact remains that in the instant matter the maximum sentence Mr. Caldwell could receive was 90 days and/or a fine of $100.00 and even though *Miller* speaks of "jurors", no case, that we are aware of, requires a jury trial in municipal misdemeanor petty offenses and therefore *Duncan*, supra, would be controlling in this situation.

In *Duncan* it was specifically held:

> "Crimes carrying possible penalties up to six (6) months *do not* require a jury trial if they otherwise qualify as petty offenses." (Emphasis added) 391 U.S. at 159

The Louisiana Supreme Court, in a case on all fours with the one at bar, has held that a defendant prosecuted for violating state obscenity statutes, violation of which is a misdemeanor, was *not* entitled to a jury trial. *State* v. *Henry*, 198 So.2d 889 (1967).

Accord: *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937); *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Frank* v. *U.S.*, 395 U.S. 1470 (1970); *Baldwin* v. *New York*, 399 U.S. 66 (1972); *Johnson* v. *Turner*, 429 F.2d 1152; *U.S.* v.

*Merick*, 459 F.2d 644; *U.S.* v. *Potvin*, 481 F.2d 380; *Maita* v. *Whitmore*, 365 F.Supp. 1331.

It is respectfully submitted that in view of the above cited and quoted jurisprudence, particularly in view of the fact that defendant is only charged with one count of violation of 828 MCS 42-46 which carries a *maximum* penalty of a fine of One Hundred Dollars ($100.00) and/or *90 days in jail*, which is *definitely* a petty offense, no right to trial by jury exists in this matter.

## II.

**DOES THE AFFIDAVIT CONTAINED IN THE APPLICATION FOR THE SEARCH WARRANT IN THIS MATTER CONTAIN SUFFICIENT FACTS AND CONTENT TO ESTABLISH PROBABLE CAUSE FOR THE ISSUANCE OF SAID WARRANT?**

While petitioner set forth three major allegations in paragraph 2 under the heading "Reasons for Granting The Writ" (P. 18) which he asserts renders the warrant invalid in this case, he only argues and discusses the alleged deficiencies in the affidavit of the officer establishing probable cause for the issuance of the warrant.

The main thrust seems to be that the affidavit, under petitioner's theory, *must* contain the provisions of and track the ordinance word for word or it is constitutionally deficient.

The question now becomes whether or not 42-46 (A) (1) and (3) must be tracked word for word in the affidavit or does the affidavit serve, as it both legally and traditionally has, merely as a fact instrument from which the judge must determine probable cause before issuing the warrant?

Respondent agrees totally with petitioner's interpretation of *Nathanson* v. *U.S.*, 290 U.S. 41 (1933) but respectfully points out that the affidavit in question is not a compendium of mere affirmances of beliefs or suspicions but rather is a detailed factual accounting of what the officer saw on the screen when he initially reviewed the film and took notes and therefore *Nathanson* does not apply. (See Affidavit, Appendix of petitioner's Brief at p. 66-78).

Additionally, the affidavit's function is only to supply factual material which may or may not warrant probable cause for the issuance of the warrant itself. When the adversary hearing was held immediately after the film was seized (see Appendix A) then, upon viewing the entire film, the determinations were made in the manner repeatedly set down by this court as well as numerous Federal District and Circuit Courts of Appeal.

Even though not thoroughly discussed in his argument, petitioner alleges that the warrant was violative of his 4th and 14th amendment rights and that the warrant was general and overbroad.

First of all, only *unreasonable* searches and seizures come within the interdict of the Fourth

Amendment. *Cooper* v. *State of California*, 386 U.S. 58 (1967).Moreover, only searches that are unreasonable under *all the surrounding circumstances* are thus prohibited. *U.S.* v. *Pierce*, 301 F.Supp. 824 (1969). Respondent respectfully shows that, considering all the circumstances under which the search in question was made, said search was not in violation of any Constitutional provisions.

In *Roaden* v. *Kentucky*, 413 U.S. 496 (1973) this Court held:

> "A search reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."

*Accord: Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

It was also held in *U.S.* v. *Bobo*, 477 F.2d 974 (1973) that:

> "The requirements of the Fourth Amendment with respect to reasonableness of searches are not inflexible or obtusely unyielding to the legitimate needs of law enforcement."

These cases lend credence to respondent's assertion that under the circumstances and considering the type of material seized, the search in question was not unreasonable or in violation of any Constitutional man-

dates. In a case similar to the instant matter it was held:

> "A warrant authorizing the search of a bookstore was not overbroad, on the ground that it gave sole discretion to police to decide what items were to be seized, where the underlying affidavit, which requested the warrant authorizing the search for and seizure of described magazines, was attached to the warrant and the warrant expressly incorporated the affidavit in specifying the items to be seized."
> *Huffman* v. *U.S.*, 470 F.2d 386 (C.A. D.C. 1971)

Petitioner also generally alleges, other than his attack upon the affidavit, that the search warrant in this case was issued without probable cause.

Like other Fourth and Fourteenth Amendment provisions probable cause is not fixed or rigid standard. It is flexible and depends on the circumstances surrounding the case. In *U.S.* v. *Melancon*, 462 F.2d 82 (5th Cir. 1972) it was held:

> "Probable cause for the issuance of a search warrant is deemed to exist where facts and circumstances within the affiant's knowledge, and of which he has reasonable trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed . . . *Only the probability, and not a prima facie showing, of criminal activity is*

> *the standard of probable cause for issuance of a search warrant.*" (Emphasis added)

*Accord: United States* v. *Rich*, 407 F.2d 934 (5th Cir. 1969).

In *State* v. *Hightower*, 272 So.2d 363 (La. 1973):

> "Probable cause for issuance of a search warrant means less than evidence which would justify condemnation."

*Accord: United States* v. *Harris*, 403 U.S. 573 (1971).

Probable cause must be considered according to ordinary and reasonable standards. The rule of probable cause for issuance of a search warrant is a practical, non technical conception. *State* v. *Anselmo*, 256 So.2d 98 (1971). See *U.S. ex rel Gaugler* v. *Brierley*, 477 F.2d 516 (1973) where it was held:

> "The Fourth Amendment requires only that the judicial officer issuing a search warrant be supplied sufficient information under oath or affirmation which would support an independent judgment that probable cause exists for the warrant's issuance."

Petitioner also argues, again in a general sense, that the warrant in question lacks the required amount of specificity in its description of the items to be seized. However, in *Melancon*, supra, it was held:

> "In judging the sufficiency of a description in a search warrant of premises to be searched, it is enough if the description is such that officers with a search warrant can, with reasonable effort, ascertain and identify the place intended."

Also, *James* v. *U.S.*, 416 F.2d 467 (1969) it was held:

> "When circumstances make an exact description of instrumentalities a virtual impossibility, the searching officer need only describe the generic class of items he is seeking when he obtains the search warrant."

Respondent shows that in this case the materials seized could not and need not have been more specifically described before their seizure. (See affidavit, Appendix of Petitioner's brief, P. 66-78). In a similar case involving allegedly obscene motion pictures, *State* v. *Eros Cinema, Inc.*, 264 So.2d 615 (La. 1972), it was noted that:

> ". . . it was difficult for the magistrate issuing the warrant to personally review a motion picture, as compared with reading a book, in order to determine obscenity before ordering a seizure."

It is respectfully submitted, therefore, that there was more than enough probable cause for issuance of the warrant and it was not general or overbroad.

In conclusion, as to the warrant, petitioner makes a specious argument at best. He cites but four cases none of which apply in this situation.

It is patently obvious that the affidavit and warrant in question meet *all* the "requirements" of 42-46 in every sense. What else can be supplied? Are the words:

> "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; and
>
> * * *
>
> "the work, taken as a whole, lacks serious literary, artistic, political or scientific value." 828 MCS 42-46 (A) (1) and (3)

"magic" in nature and if not quoted verbatim in the affidavit does this then render the entire case null and void, or does not the facts as set forth in the affidavit supply these meanings with enough reasonableness for the judge to determine probable cause before issuing the warrant?

No decision of this Court, that respondent is aware of, has every held that these exact words must be written down verbatim and incorporated in an application for a search warrant or it is constitutionally deficient. This would, it is respectfully submitted, be an unnecessary and confusing requirement for we would lose track of the main objective and get bogged down in the question of whose formulary is

the best rather than what the objective of and the "law" should be.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari in this matter be denied and dismissed.

Respectfully submitted,

JOEL P. LOEFFELHOLZ
Assistant City Attorney
715 S. Broad Street
Room 522
New Orleans, Louisiana 70119

BLAKE G. ARATA
City Attorney

## CERTIFICATE

I hereby certify that a copy of the above and foregoing Response and Motion to Dismiss Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana has been forwarded to opposing counsel by depositing same in the U.S. Mail, postage prepaid, this 8 day of May, 1975.

JOEL P. LOEFFELHOLZ
Assistant City Attorney

MUNICIPAL COURT
CITY OF NEW ORLEANS

CITY OF NEW ORLEANS

versus

JAMES CALDWELL

FILED:

MOTION AND ORDER FOR
ADVERSARY HEARING

Now, comes The City of New Orleans and respectfully shows that the above named defendant was arrested and charged with violation of 828 MCS 42-46 by displaying and showing and charging admissions to see a movie entitled "Deep Throat" on Friday, May 10, 1974 at or about 4:30 P.M. in the City of New Orleans at 1016 Canal Street, commonly called "Cinema 16 Theatre";

Now, therefore, The City of New Orleans hereby respectfully moves that this Court order that an adversary hearing be held within 48 hours in order to determine if said film is or is not obscene within the meaning of and as delineated by 828 MCS 42-46.

JOEL P. LOEFFELHOLZ
Assistant City Attorney
715 South Broad Street
822-7145

FREEMAN R. MATTHEWS
Assistant City Attorney
715 South Broad Street
822-7145

BLAKE G. ARATA
City Attorney

ORDER

Considering the foregoing motion:

IT IS ORDERED that an adversary hearing in this matter be held on the ____ day of May, 1974 at ____ o'clock in order to determine if the film "Deep Throat" is or is not obscene within the meaning of and as delineated by 828 MCS 42-46.

New Orleans, Louisiana this 13th day of May, 1974.

JUDGE

## APPENDIX B

OFFICE OF THE
SUPREME COURT OF LOUISIANA
New Orleans, 70112

January 22, 1975

Dale C. Wilks, Esq.
Rittenberg & Wilks, Esqs.
Attorneys at Law
234 Loyola Avenue, Suite 819
New Orleans, Louisiana 70112

Re: No. 55,666
City of New Orleans v. James Caldwell

Dear Mr. Wilks:

The Court today issued a stay of the judgment in the above entitled matter, this order reading as follows:

> "On consideration of the petition and motion of James Caldwell, defendant-appellant in the above numbered and entitled cause: IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed, and arrested pending and until the 21st day of February, 1975, in order to permit James Caldwell to seek a writ of certiorari from the Supreme Court of the United States."

You will note that this stay is only to permit you to file your writ with the United States Supreme Court within the time permitted, any further stay thereof will have to be obtained from the United States Supreme Court.

If you have any questions, please ask me.

With kindest regards, I am,

Yours very truly,

/s/ HAROLD A. MOISE, JR.
Clerk

HAMJr:db
ccs: Hon. Blake Arata
Joel P. Loeffelholz, Esq.
Mr. Dan Kelly, Esq., Clerk (Your No. 149,117)
Mr. Edwin A. Lombard, Esq., Clerk (Your No. 244-524)

DOCKET NUMBER: 55,666

SUPREME COURT
STATE OF LOUISIANA

CITY OF NEW ORLEANS

versus

JAMES CALDWELL

ORDER FOR SUPERSEDEAS, STAY OF EXECUTION AND STAY AND RECALL OF MANDATE AND STAY AND ARREST OF JUDGMENT

On Consideration of the petition and motion of James Caldwell, defendant-appellant in the above numbered and entitled cause:

IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed, and arrested pending and until the 21st day of February, 1975, in order to permit James Caldwell to seek a writ of certiorari from the Supreme Court of the United States.

* * * *

NEW ORLEANS, LOUISIANA, this 22nd day of January, 1975.

JOE W. SANDERS, Chief Justice, Supreme Court of the State of Louisiana.

/s/ JOE W. SANDERS

## APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 26, 1975

Dale C. Wilks, Esq.
Rittenberg & Wilks — Suite 819
2-3-4 Loyola Ave.
New Orleans, La. 70112

RE: James Caldwell v. City of New Orleans 74-1062
A-690 (Supreme Ct. of La., #55,666)

Dear Sir:

The Court today entered the following order in the above-entitled case:

The application for stay of execution and enforcement of sentence, presented to Mr. Justice Brennan and by him referred to the Court, is denied. Mr. Justice Douglas and Mr. Justice Marshall took no part in the consideration or decision of this application.

Very truly yours,

Michael Rodak, Jr., Clerk
By

/s/ HELEN TAYLOR
Helen Taylor (Mrs.)
Assistant Clerk

## APPENDIX D

CITY OF NEW ORLEANS
Department of Law
February 26, 1975

Mr. Michael Rodak
Clerk
United States Supreme Court
Washington, D.C.

Re: James Caldwell, Petitioner versus The City of New Orleans, Respondent.

Dear Mr. Rodak:

We have been served with copies of Petition for Writ of Certiorari and Application for Supersedeas and Stay in the above captioned matter.

Upon reading the writ, I wish to point out one inaccuracy contained at the bottom of Page 14 and the top of Page 15 where it is stated that the maximum penalty for violation of the ordinance in question is imprisonment for six (6) months and/or a fine of One Hundred ($100.00) Dollars.

I must respectfully point out that the maximum penalty for violation of *any* Municipal Ordinance of the City of New Orleans is limited, by State Constitution and City Charter, to *ninety (90) days* and/or a fine of One Hundred ($100.00) Dollars.

Yours truly,

/s/ JOEL P. LOEFFELHOLZ
Joel P. Loeffelholz
Assistant City Attorney

JPL:slh